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No. 02-1606

Supreme Court, U.S.
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In The Supreme Court Of The United States

TENNESSEE STUDENT
ASSISTANCE CORPORATION,
Petitioner,

v.

PAMELA L. HOOD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF OF OHIO AND 47 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF *AMICI* INTEREST

Amici State of Ohio and 47 other States have a vital interest in this case, as it implicates one of the most controversial and publicly-debated legal issues of recent years—the power of Congress to abrogate the States' Eleventh Amendment immunity. The issue is squarely presented here in a context not yet addressed by this Court, but vital to a State's ability to control its fisc: bankruptcy.

The States of Ohio, Michigan and Kentucky plainly have a strong interest in the resolution of the case, as they are within the jurisdiction of the Sixth Circuit. But the other *amici* States also have a strong interest in the case because—unlike in other fields of federal jurisprudence—it is common for States to be involved in bankruptcies in Circuits other than their own. For instance, Florida faced about 45 adversary proceedings last year, and 17, or 38%, were filed in circuits other than the Eleventh. In the first four months of 2003, two adversary actions were filed against Virginia, both of which were outside the Fourth Circuit. In 2002, Alaska was a defendant in eleven adversary actions, four of which, or 36%, were outside the Ninth Circuit. And Michigan currently has 9 adversary actions, 2 of which, or 22%, are outside the Sixth Circuit.

The possibility of being haled into bankruptcy court across the United States gives the States a strong interest in ensuring that the constitutional requirement of "uniform Laws on the subject of Bankruptcies throughout the United States" is met. U.S. Const. art. I, § 8. The current split among the circuits on the issue of sovereign immunity exposes the States to varying treatment depending on the circuit in which the bankruptcy proceeds, thereby frustrating clear constitutional intent.

In short, because the States have no control over a debtor's choice of forum, this case could have a significant impact on the public fisc of all the States, not just those in the Sixth Circuit. *Amici* States therefore urge this Court to grant certiorari and reverse.

REASONS FOR GRANTING THE WRIT

The petition should be granted for at least three reasons. First, the decision creates a conflict in the circuits. Moreover, the decision below creates a particularly harmful conflict because a State is often haled into bankruptcy court outside its home circuit. Second, the decision ignores the entire body of recent case law, as well as the intent of the Founders, on the issue of Eleventh Amendment immunity of the States and the power of Congress to abrogate Eleventh Amendment immunity in the area of bankruptcy. Finally, resolution of the abrogation issue in this case is a necessary predicate to the resolution of additional bankruptcy issues of great importance to the States, including the scope of a waiver of sovereign immunity, and the extent to which the *Ex parte Young* doctrine applies in bankruptcy.

I. The Circuits Are Split on the Question Presented.

In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court made clear that Congress lacks power to abrogate a State's sovereign immunity by passing legislation under Article I. As detailed below, the Court has reiterated this principle numerous times since *Seminole Tribe*. However, Congress had attempted an express abrogation under its Article I powers in the 1994 amendments to the Bankruptcy Code. 11 U.S.C. §106 (a).

The Third, Fourth, Fifth, Seventh and Ninth circuits have held that §106 (a) is unconstitutional because—for

purposes of Eleventh Amendment immunity—no principled difference exists between the Bankruptcy Clause and other Article I clauses. *Nelson v. Lacrosse Co. Dist. Atty.* (*In re Nelson*), 301 F.3d 820 (7th Cir. 2002); *Mitchell v. Franchise Tax Bd.* (*In re Mitchell*), 209 F.3d 1111, 1120 (9th Cir. 2000); *Sacred Heart Hosp. of Norristown v. Pa.* (*in re Sacred Heart Hosp. of Norristown*), 133 F.3d 237, 245 (3d Cir. 1998); *Dept. of Transp. & Dev. v. PNL Asset Mgmt. Co. LLC* (*In re Estate of Fernandez*), 123 F.3d 241, 246 (5th Cir. 1997); *Schlossberg v. Md.* (*In re Creative Goldsmiths of Wash. D.C., Inc.*), 119 F.3d 1140, 1147 (4th Cir. 1997).

The Sixth Circuit majority decision below represents a radical departure from these other circuits. The court below held that the States ceded their sovereign *immunity* in bankruptcy court, as well as their sovereign *authority* over the area of bankruptcy in the plan of the Constitutional Convention. The court below thus concluded that Congress had the power to abrogate—and did abrogate—the States' immunity in 11 U.S.C. § 106 (a). In doing so, the Sixth Circuit created a clear conflict with the other circuits that have reached the issue.

The importance of resolving this conflict now is demonstrated by the fact that of the six circuits that have yet to resolve the issue, four have faced it. For instance, the First Circuit has at least twice been presented with—but not reached—the abrogation issue. *Gosselin v. IRS* (*In re Gosselin*), 276 F.3d 70 (1st Cir. 2002) (dismissal affirmed on other grounds); *Arecibo Community Health Care, Inc. v. Puerto Rico Dept. of Health* (*In re Arecibo Community Health Care*), 270 F.3d 17 (1st Cir. 2001) (dismissed on waiver). The Eighth, Tenth and Eleventh Circuits have similarly encountered but avoided the abrogation issue by holding that the State had waived its immunity. *Rose v. Missouri Student Loan Program* (*In re Rose*), 187 F.3d 926

(8th Cir. 1999) (*but see May v. Missouri Dept. of Revenue* (*In re May*), 2001 U.S. App. LEXIS 3825, (8th Cir. 2001) (implying immunity)); *Straight v. Wyoming DOT* (*In re Straight*), 143 F.3d 1387 (10th Cir. 1998); *Georgia Dept. of Revenue v. Burke* (*In re Burke*), 146 F.3d 1313 (11th Cir. 1998). In short, this issue will not go away.

Given the importance of bankruptcy to both States and individuals, and this Court's recent holdings on the Eleventh Amendment, the conflict in the circuits on this recurring issue is alone sufficient reason for the Court to grant certiorari.

Moreover, the division and confusion on this issue is particularly harmful to the States because it is far more likely than in other areas of the law that a State will find itself haled into bankruptcy court outside its home circuit. For example, Massachusetts—a State within the First Circuit—is currently a defendant in a case in Tennessee—a State within the Sixth Circuit. The bankruptcy court held that Massachusetts had lost its sovereign immunity. *See In re Service Merchandise Company Inc.*, 262 B.R. 738 (Bankr. M.D. Tenn. 2001). The District Court later reversed, 265 B.R. 917 (M.D.Tenn., 2001), but its ruling is on appeal and will be overturned by the Sixth Circuit unless the Court grants certiorari and reverses. Thus the conflict of authority prevents a State from effectively planning and guiding its actions based on the law of its circuit—which the States do in most other areas of federal law.

In addition, of course, debtors now know that they have a "free pass" in the Sixth Circuit—they can file adversary proceedings against a State without having to worry about immunity. Debtors with substantial state debt will therefore have a strong motive to file for bankruptcy in a

Sixth Circuit State if they can. The chances of bankruptcy litigation in a Sixth Circuit court are therefore increased for every State.

Finally, conflict in the circuits and lower courts is particularly harmful in the bankruptcy context because of the constitutional requirement for "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8. "The constitutional requirement of uniformity is a requirement of geographic uniformity." *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 172 (1946) (Frankfurter, J., concurring). If the Eleventh Amendment protects state immunity in some circuits and not in others, the Bankruptcy Code will no longer be geographically uniform, and clear constitutional intent will be frustrated.

The Court should grant certiorari to clear the conflict of authority about Congress's power to abrogate Eleventh Amendment immunity in the Bankruptcy Code.

II. This Case Squarely Presents the Issue of Congress's Power to Abrogate Eleventh Amendment Immunity in a New Context—Bankruptcy.

In case after case, the Court has repeatedly affirmed that Congress cannot use its Article I powers to override the States' Eleventh Amendment immunity. "The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996). "Congress may not abrogate state sovereign immunity pursuant to its Article I powers, hence the Patent Remedy Act cannot be sustained under either the Commerce Clause or the Patent Clause." *Florida Prepaid Postsecondary Education Expense*

Board v. College Savings Bank, 527 U.S. 627, 636 (1999). "[I]t is settled doctrine that neither substantive federal law nor attempted congressional abrogation under Article I bars a State from raising a constitutional defense of sovereign immunity in federal court." *Alden v. Maine*, 527 U.S. 706 (1999). "Congress may not, of course, base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I." *Board of Trustees v. Garrett*, 531 U.S. 356, 364 (2001). *See also City of Boerne v. Flores*, 521 U.S. 507 (1997); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 79 (2000).

Rather, Congress can abrogate the States' Eleventh Amendment immunity only through an exercise of its Fourteenth Amendment powers to "remedy and deter a violation of a constitutional right." *Board of Trustees v. Garrett*, 531 U.S. 356, 365 (2001). *See Nevada Dept. of Human Resources v. Hibbs*, No. 01-1368, *slip op.*, (May 27, 2003), 2003 U.S. LEXIS 4272; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985); *Seminole Tribe*, 517 U.S. at 59; *City of Boerne*, 521 U.S. at 516-53; *Kimel*, 528 U.S. at 80, *Alden*, 527 U.S. at 756, *Florida Prepaid*, 527 U.S. at 637. But, as discussed below, there is simply no constitutional right cognizable under the Fourteenth Amendment at issue in bankruptcy.

Despite the many recent cases addressing the boundaries of State sovereign immunity, the Court has not had the opportunity to consider that issue in the bankruptcy context. The closest it came was *In the Matter of Merchant's Grain, Inc.*, No. 95-561, a case before the Court on a petition for certiorari from the Seventh Circuit the same year as

Seminole Tribe. After ruling in *Seminole Tribe*, however, the Court granted the State of Ohio's petition, vacated the decision below and remanded for consideration in light of *Seminole Tribe*. 517 U.S. 1130. On remand, the sovereign immunity issue was mooted, and the Court has not revisited it. The Court should embrace this opportunity and grant certiorari.

The need is particularly pressing because, despite overwhelming precedent from this Court, the Sixth Circuit decision below adopted an obsolete and discredited theory of sovereign immunity. It held that Congress can abrogate a State's sovereign immunity from suit simply by passing legislation under Article I because the States ceded their sovereign immunity in the plan of the Constitutional Convention. This idea is nothing new—it was the rationale behind the now-defunct plurality opinion in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1988), in which this Court expressly overruled in *Seminole Tribe*.

Moreover, the early history of the Constitution and of bankruptcy laws, together with more recent case law, demonstrates that Congress's power to abrogate immunity in bankruptcy court is no more potent than it is with regard to other Article I powers. Indeed, the scope of Congress's bankruptcy powers is, in some ways, more limited than its powers under other Article I provisions. This Court has held that Congress's power under the Commerce Clause, for instance, is so broad that it preempts States from even legislating within its sphere—the so-called "dormant commerce clause" doctrine. In the bankruptcy context, by contrast, States are allowed to pass—and have passed—insolvency laws in the absence of federal bankruptcy coverage. *Sturgis v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).

Nor, as some courts have suggested, does the constitutional requirement of uniformity provide any greater authority for Congress to abrogate. First, the uniformity requirement is primarily geographic in nature—the laws must be uniform throughout the United States—and therefore does not present difficulties in treatment between States and private persons. *Vanston Bondholders*, 329 U.S. at 172. Second, neither the comprehensiveness of a federal power nor a legitimate desire for uniformity in a scheme of federal law can overcome the States' sovereign immunity. *Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743, 767 (2002); *Florida Prepaid*, 527 U.S. at 647-48.

Similarly, the fact that bankruptcy courts are authorized under Article I rather than Article III gives Congress no power to overcome the States' sovereign immunity. Congress cannot circumvent the limitations placed on Article III courts by creating Article I courts. *See Federal Maritime Commission*, 535 U.S. at 756-767.

Nor can Congress abrogate state sovereign immunity by attempting to repackage its exercise of Article I bankruptcy power as an exercise of its Fourteenth Amendment power. Congress's authority to legislate, and therefore its ability to abrogate, under the Fourteenth Amendment is limited to situations where it is protecting an individual's constitutional right from State intrusion. *College Savings Bank*, 527 U.S. at 672; *City of Boerne*, 521 U.S. at 516-520. There is, however, no constitutional right to a discharge in bankruptcy. *United States v. Kras*, 409 U.S. 434 (1973). Therefore, even if Congress had purported to rely on its authority under the Fourteenth Amendment in enacting 11 U.S.C. §106 (a)—and it did not—that would still provide no basis for Congress to abrogate State sovereign immunity.

In short, "there is simply no principled basis to distinguish the Bankruptcy Clause from other Article I clauses." *In re Sacred Heart Hospital of Norristown*, 133 F.3d at 243. The Court should grant certiorari and reverse.

III. Resolving This Issue Is Necessary to Resolving Other Bankruptcy Issues of Importance to the States.

The *amici* States also urge the Court to grant certiorari in this case because the issue here must be resolved as a necessary predicate to the resolution of at least two other critical and controversial issues regarding the interaction of bankruptcy and sovereign immunity.

First is the issue of dischargeability and the *Ex parte Young* doctrine. *See Ex parte Young*, 209 U.S. 123 (1908). If the States retain sovereign immunity in bankruptcy, does a bankruptcy court have the power to declare a state debt dischargable in an adversary proceeding—thus potentially creating a *new* obligation under federal law, rather than enforcing an *ongoing* violation of federal law—using the *Ex parte Young* fiction?

Second, considerable controversy exists over the extent to which a State waives its sovereign immunity when it files a proof of claim in bankruptcy. The Court held in *Gardner v. New Jersey*, 329 U.S. 565 (1947), that filing a proof of claim waives a State's sovereign immunity in bankruptcy court. But the *scope* of a proof-of-claim waiver is still a matter of controversy—does the waiver extend only to the amount of the proof of claim, or does it allow a positive recovery against the State?

The *amici* States clearly have a strong interest in both the *Ex parte Young* and proof-of-claim issues. Both planning

and litigation decisions aimed at protecting the State's fisc are compromised as long as these issues remain unresolved. In addition to the importance of resolving the precise issue presented here, the Court should also grant certiorari to pave the way for resolution of these important issues in future cases.

CONCLUSION

For the foregoing reasons, *amici* States of Ohio and 47 other States respectfully request the Court grant the writ of certiorari.

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